United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1001

To be argued by
HENRY J. BOITEL

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1001

UNITED STATES OF AMERICA,

Appellee,

—vs.—

VICTOR LEONG, ERNST OLSEN and
WONG CHOU SHEK,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN BEHALF OF APPELLANT VICTOR LEONG

HENRY J. BOITEL
Attorney for Appellant Victor Leong
233 Broadway
New York, New York 10007
(212) RE 2-8104

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Preliminary Statement

Victor Leong appeals from a judgment of conviction entered against him on December 16, 1975, after a jury trial before the Honorable Robert J. Ward, in the United States District Court for the Southern District of New York.

The indictment was filed on March 5, 1975 (A. 1).* It contained sixteen counts. Count 1 charged that all of the defendants conspired with each other to import heroin into the United States, export heroin from the United States, and possess heroin with the intention of distributing it.** The conspiracy was alleged to have existed from May 1, 1972 through to the date of the filing of the indictment.***

The remaining fifteen counts charged individual defendants with the substantive crime of possessing heroin in the Southern District of New York with the intention of distributing it.

Various defendants were severed from the trial upon application of the government (A. 3), two defendants entered pleas of guilty to Count 1 prior to trial [Pon You Wing and Lee Louie](A. 3), and various other defendants appear to have been fugitives of the jurisdiction (A. 1). As a result, only four defendants

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* References herein to the joint appendix filed in behalf of the appellants Victor Leong and Wong Chou Shek, are preceded by "A.". References herein to the trial transcript are preceded by "Tr.".

** The activities in question were alleged to be in violation of the following Federal statutes: 21 U.S.C. § 841(a)(1)- possession with intent to distribute; 21 U.S.C. § 846 - attempt and conspiracy; 21 U.S.C. § 952 - importation; 21 U.S.C. § 953- exportation; 21 U.S.C. § 963 - attempt and conspiracy.

*** In contrast, the last overt act alleged by the indictment occurred on December 24, 1972. The trial proof demonstrated beyond doubt that the alleged conspiracy had been dismantled as of that date and that its architect and exclusive source of supply was cooperating with the government.

stood trial: Victor Leong, Ernst Olsen, Wong Chou Shek, and Louie Yiu Che (Louie Gin). Louie Gin was acquitted upon Count 1, the only count with which he was charged. Each of the remaining defendants was convicted under Count 1. Additionally, Leong was convicted under Count 6 and Olsen was convicted under Counts 2, 11 & 14.

On December 16, 1975, Leong was sentenced to serve three years imprisonment, to be followed by three years of special parole, on both Counts 1 & 6 to be served concurrently; Wong Chou Shek was sentenced to five years imprisonment to be followed by three years of special parole; Olsen was sentenced to fifteen years imprisonment, to be followed by three years of special parole, as to each of Counts 1, 2, 11 & 14, to be served concurrently with each other and concurrently with a Federal prison sentence he was already serving.

Questions Presented for Review

1. Did the trial proof fail to establish venue within the Southern District of New York as to the only substantive offense with which the defendant Leong was charged?

2. In view of the lack of venue in the Southern District of New York, as to the substantive offense, should the conspiracy conviction also be reversed in view of the fact that the critical overt act of the defendant Leong was not shown to have occurred in New York and in view of the Court's refusal to strike that overt act from the indictment? In any event, should the conspiracy conviction be reversed in view of the prejudice generated by the erroneous submission of the substantive count?

3. Was the venue question properly preserved for appellate review? If not, should this Court notice it as plain error?

4. Did the trial evidence establish that the single alleged conspiracy was in fact multiple conspiracies, including a conspiracy to import heroin from the Orient directly into Canada (as to which the United States had no jurisdiction), a separate conspiracy to distribute heroin in the San Francisco area, and another conspiracy to distribute heroin in the New York area? In any event, should the defendant Leong have been given the benefit of the "single act" theory, thus relieving him of any charge of conspiracy?

5. Was the Court's charge with respect to multiple conspiracies and with respect to membership in the conspiracy clear error?

6. Was the defendant Leong deprived of a fair trial by the efforts of the co-defendant Olsen to establish a double jeopardy claim?

7. Should the defendant Leong have been granted a mistrial and a severance in view of the government's proof of multiple conspiracies, the trial strategy of the co-defendant Olsen, the proof of "single act", the government's proof of "fear", and the government's excessively cumulative evidence?

8. Did the prosecutor wrongfully violate the defendant Leong's right against compulsory self-incrimination and deprive him of a fair trial by the tactic, in summation, of putting questions to Leong's counsel?

9. Should the defendant Leong have been given a post-trial evidentiary hearing with respect to whether certain illegally seized material tainted the government's trial proof?

10. Should the defendant Leong's conviction be reversed for any applicable reason advanced in the briefs of the co-appellants?

Statement of Facts

A. The Shipments to North America; a Buyer in the United States; an Organization in Canada.

The principal malefactor in the events charged by the indictment and shown by the trial proof was Wong Shing Kong, also known as Stanley Wong [hereinafter, "Wong"]. He was granted immunity and testified as a government witness. (Tr. 99 et seq.). Wong was a former seaman and had substantial experience in the illicit narcotics trade. (Tr. 505, 576). In April, 1971, Wong was a shipmate with Sze Chun Kam [hereinafter, "Sze"] aboard the Jens Maersk. In a conversation, Wong mentioned that he had a buyer for heroin in the United States, and Sze mentioned that he had a supplier of heroin in Bangkok. Wong then signed off the ship in Hong Kong and Sze went on to Bangkok. (Tr. 100-104, 109, 116).

In May or June of 1971, Sze invited Wong to Bangkok to meet the source of supply, Ma Tsu T'Sung [hereinafter, "Ma"], who appears to have been assisted in his nefarious trade by his nephew, Tony Ma. Ma agreed to supply substantial amounts of heroin and opium to Wong, with delivery in Bangkok. (Tr. 109-128). All of the drugs in the present case originated with Ma, who turned them over to Lam in Bangkok.

Following the meeting with Ma, Wong met in Bangkok, by pre-arrangement, with another former shipmate,

Ernst Olsen. Olsen agreed to recruit seamen for the purpose of exporting the drugs from Bangkok. (Tr. 128-135).

While Olsen was engaged in the recruitment task, Wong came across a seaman (whose name he could not recall), and enlisted the seaman to transport 22 1/2 pounds of heroin and 100 pounds of opium to the United States aboard the ship Clifford Maersk. The effort failed when the seaman became frightened and the narcotics were not placed on the ship (Tr. 135-6, 149-154).

While these events were occurring, Wong ordered and received special suitcases with hidden compartments for the purpose of smuggling the drugs (Tr. 168, 193-200). It was then agreed that Olsen would transport several such suitcases, containing a total of 18 pounds of heroin, to New York by plane. He did so on or about August 26, 1971. (Tr. 200-205). In the interim, Wong contacted another former crewmate, Lam Kin Sang [hereinafter, "Lam"] who was in New York. Lam agreed to accept and attempt to sell the shipment that Olsen was about to transport to New York (Tr. 200-203).*

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* As it later developed all drugs distributed in the United States in this case were distributed by Lam. Lam testified as a government witness (Tr. 719 et seq.). He had previously been convicted after trial in the Southern District of New York, and his conviction was affirmed by this Court without opinion, United States v. Kin Sang Lam, 483 F. 2d 1399 (Oct. 1, 1973). He thereafter sought out the prosecution for the purpose of "cooperating" with the expectation of shortening his incarceration. He admitted that at his own trial he had

[footnote continued on following page]

There thus commenced the series of importations and distributions in this case. The chart, which is reproduced at p. 19 , infra, sets forth each of the completed and attempted exportations of drugs from the Orient. As will hereinafter be noted, Wong embarked on a course of exporting from the Orient drugs directly to the United States and directly to Canada. The chart which appears at p. 20, infra, sets forth the distributions within the United States. The chart which appears at p. 21 , infra, sets forth the distributions within Canada of the imported drugs.

Two seaman, Conny Gustaffson and Steiner Furu, were thereafter recruited to transport 15 pounds of heroin and 100 pounds of opium to New York aboard the Thomas Maersk. The ship departed from Bangkok on October 3, 1971. (Tr. 255).*

[footnote continued from preceding page]
perjured himself, (Tr. 929-968), and that following his own arrest he had engaged in numerous additional narcotics transactions, unrelated to this case (Tr. 926). His cooperation with the government was induced by his understanding that a government attorney had threatened him with a life sentence (Tr. 1116).

Lam was the only witness who testified against Leong.

* At or about this time, arrangements were also made for three additional shipments by sea to New York. (Tr. 268-273).

(1) A shipment left Bangkok, but the seaman/courier became frightened and signed off the ship in Hong Kong with the 15 pounds of heroin on November 10, 1971.

(2) John Thomsen, a government witness, departed Bangkok on the Luna Maersk on October 23, 1971. He brought the drugs ashore in New York on December 25, 1971.

(3) Eric Hansen departed Bangkok on November 8, 1971, on the Lica Maersk. The ship arrived in New York on January 6, 1972, but, due to the arrest of a U.S. buyer, Wong had Olsen instruct Hansen to keep the drugs on board and return them to Bangkok. That was done. (Tr. 253-6).

On November 18, 1971, Wong flew to Vancouver where he renewed an acquaintance with Robert Li. It was arranged that Li would sell narcotics in Canada for a ten percent (10%) commission. Li immediately came up with a customer, Low Bing, who ordered 5 pounds of heroin and requested another 10 pounds before Christmas. A third person, Johnny Chau, was employed to assist in the operation (Tr. 285-291).

On November 23, 1971, Wong went from Vancouver to New York, where he met Lam and Olsen and they awaited the arrival of Gustaffson and Furu on the Thomas Maersk, which occurred on November 29, 1971. The 15 pounds of heroin was removed from the ship; however, they could not safely remove the 100 pounds of opium. As a result, the opium remained on the ship and was returned to Bangkok (Tr. 298-303). Lam accepted delivery of 7 1/2 pounds in New York. It was agreed that he would accept delivery of an additional 2 1/2 pounds, from that shipment, in Vancouver. Thus, Olsen flew with 7 1/2 pounds of heroin to Vancouver, in order to fill the orders of Low Bing and Lam (Tr. 303-7, 334-351).

While Wong was in Vancouver conducting the distribution of the 7 1/2 pounds, Low Bing introduced him to one Tony Wong [hereinafter, "Tony"]. Tony said that he would purchase large quantities of drugs from Wong <u>on the condition that Wong would not sell to anyone else in Vancouver</u>. (Tr. 338-9). <u>That condition</u>

was so strictly adhered to that Wong would not permit sale of any of the Canadian shipments to Lam. (Tr. 691-700, 897).

Following the completion of the above noted transactions in Vancouver, Wong travelled to New York, and awaited the arrival of the ships Luna and Lica which, respectively, carried 20 pounds and 18 pounds of heroin (Tr. 351 and footnote at p. 7, supra). The ships were delayed (Tr. 356). Several weeks later, Wong received a telephone call from Lam who reported that one of Lam's San Francisco customers had been arrested and that efforts should be made not to bring any more heroin into the Country (at least for the time being). To that end, Wong instructed Olsen to contact the couriers on the Luna and the Lica. Then Wong and Olsen returned to Bangkok on or about December 23, 1971.

On December 25, 1971, John Thomsen unloaded the heroin from the Luna, not having received the instruction to do otherwise (Tr. 397-8). The heroin was stored at a home for seamen until Olsen later picked it up. However, Wong was successful in directing Eric Hansen to keep the shipment on board the Lica, which arrived on January 6, 1972, and Hansen returned to Hong Kong with that heroin still aboard ship. (Tr. 353-356, 391).

Upon returning to Bangkok, Wong made arrangements with Ma for the purpose of starting direct shipments

of heroin to Vancouver. (Tr. 361-368). Commencing in late December and through mid-March, the only shipments of heroin in this case were by direct air flight to Canada. (Hansen, on the Lica, had been enroute since November 8, 1971, and when he arrived in January, he was turned back). There were five such shipments, ranging from 16 to 20 pounds each, and the couriers were Arne Anderson and Steiner Furu. (See: shipments numbered 9 through 13 on Chart "A", infra, p. 19. (Tr. 371-418). During this time, Sze was sent to Canada to replace Johnny Chau in the government of the Canadian distributions. He left for Vancouver on February 12, 1972. Soon thereafter, he reported that he had found a "big buyer" (Tr. 382-389, 394).*

On March 13, 1972, heroin traffic to the United States was resumed with the departure of John Thomsen on the Luna Maersk. (Tr. 415). He arrived in New York in April, 1972, and stored the 20 pounds of heroin at the home of a girlfriend in Brooklyn, pending further instructions. As it turned out, the narcotics remained in the suitcases at the girlfriend's house until December 25, 1972, when Thomsen was arrested and the narcotics were seized by agents of the Drug Enforcement Administration.

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* Sze testified as a prosecution witness, under a grant of immunity, and did not mention Leong (Tr. 2027 et seq.).

Following Thomsen's March departure from Bangkok, 20 pounds of heroin were sent with one Bernard Dalan by air from Bangkok to Canada on April 7, 1972. (Tr. 421, 432). At or about the same time, Wong went from Bangkok to Vancouver (Tr. 421). While there, he arranged to sell the coming Luna shipment to Lam (Tr. 435). In mid-April, one of Lam's employees was arrested. As with the prior Luna shipment, this again prompted an effort to have the Luna shipment turned back from New York and the effort was again unsuccessful. This time, Thomsen stored the 18 pounds of heroin at a girlfriend's home in Brooklyn (Tr. 438-40, 457).

On April 20, 1972, Wong arrived back in Bangkok in an effort to get Ma to lower the price of the heroin since Sze's "big Canadian buyer" was holding up purchases due to price (Tr. 441-3).

Another 20 pounds were dispatched with Gustaffson on the Thomas Maersk on May 19, 1972, arriving in Montreal on July 19, 1972. (Tr. 443).

Thereafter, Wong made a series of shipments of narcotics from Bangkok to the island of Taiwan (Tr. 445). In early August, he received word that his Taiwan operation had been uncovered, and he went into hiding on the Burma-Thailand border in order to avoid apprehension (Tr. 448, 527). In December, 1972, Wong established contact with United States Agents in Bangkok, and offered his cooperation in return for a

promise of non-prosecution. As a result, Wong became a government witness in several trials, including the present one. He also arranged for the recovery from Thomsen of the narcotics that were being stored at the home of Thomsen's girlfriend in Brooklyn. When Thomsen produced the narcotics, Federal agents seized the material and arrested him. (Tr. 448-457).

Wong did not testify to having any contact with or knowledge of the defendant Victor Leong. He made clear that he had no knowledge of the means of distribution utilized by Lam in the United States (Tr. 617, 625).

B. The Distribution of Narcotics Within the United States.

Although Wong claimed that he had a number of distributors in the Metropolitan New York area (Tr. 618), the only distributor about whom he gave testimony was Lam, as outlined supra. Several witnesses testified with respect to distribution in the United States. As indicated by Chart "B", infra, p. 20, the heroin route to and through the United States was from Ma to Wong to the seamen/couriers then back to Wong or Olsen in the United States and then to Lam. Lam, in turn, sold the heroin to a variety of individuals in New York and in San Francisco.

Lam accepted the first delivery of 18 pounds of heroin (flown to New York by Olsen) on or about August 26, 1971 (Tr. 748). He then commenced making inquiry in

various New York Chinese gambling houses for persons who might be willing to buy or find buyers for the heroin. Over the course of the next several weeks, three 1 pound sales were made to Lee Louie in Manhattan (Tr. 749-756). A 1/2 pound sale of heroin was allegedly made to Victor Leong (Tr. 757-761).*

In September, Lam travelled to San Francisco where he allegedly met the defendant Wong Chou Shek by pre-arrangement, at Wong Chou Shek's gambling house.** Lam sought to enroll Wong Chou Shek as a distributor of heroin. Wong Chou Shek responded that he had never engaged in such business before, but eventually introduced Lam to Pon You Wing, who purchased 1 pound of heroin of 4 pounds that Lam brought to San Francisco with him.

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* Part C of this statement of facts, infra, p. 16 focuses upon Leong's alleged involvement.

** The facts with respect to Lam's involvement with Wong Chou Shek are as alleged in the testimony of Lam and in the testimony of Pon You Wing (also known as Ah Fuh). Pon You Wing testified as a government witness, having previously made the mistake of selling 1 pound of heroin to undercover policewomen in San Francisco, as part of the chain of distribution in this case. Pon You Wing has never had any narcotics dealings with the defendant Leong (Tr. 1406-7). The credibility and sufficiency of the testimony with respect to Wong Chou Shek will, of course, be treated in his own brief on appeal.

(Tr. 762-6).

During this same trip to San Francisco, Lam made two 1 pound sales to an individual known as "Ah Kay", and an additional 1 pound sale to Pon You Wing. Then Lam returned to New York. (Tr. 772-6).

Prior to leaving for San Francisco, Lam had given 5 pounds of heroin to one Eng Fong. Upon Lam's return to New York, Fong paid for 1 pound and returned the remaining 4 pounds (Tr. 777).

In October and November, 1971, each time allegedly making arrangements with Wong Chou Shek, Lam made sales of 4 pounds, 7 pounds and 2 pounds, respectively, to Pon You Wing (Tr. 782-793). Another similar sale was made in early December in the amount of 4 pounds. Shortly thereafter, Pon You Wing and Wong Chou Shek were arrested in California. Wong Chou Shek was released without charges, but Pon You Wing was charged and released on bail which was supplied by Wong Chou Shek (Tr. 796, 412 et seq.).*

In December, 1971, Wong Chou Shek allegedly told Lam that he had a friend in Vancouver who would

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* These arrests, communicated by Lam to Wong, caused Wong to attempt to turn back the shipments that were enroute aboard the Luna and the Lica, as described supra, p. 9.

like to purchase some heroin. Pursuant to this information, Lam arranged with Wong for the delivery of 2 1/2 pounds of heroin in Vancouver, as described supra, p. 8. Thereafter, Wong Chou Shek allegedly met with Lam in Vancouver, and introduced an individual known as Communist Pui who was the ultimate recipient of the 2 1/2 pounds (which was raised to 3 1/2 pounds by the addition of milk sugar). (Tr. 808).

Toward the end of December, Lam enlisted the aid of the Chan brothers and Jimmy Ding in New York for the purpose of helping him to sell heroin there (Tr. 828).*

Toward the end of February or early March, Olsen delivered to Lam the 18 pounds of heroin which had arrived with Thomsen on the Luna on December 25, 1971, and which had been stored in a home for seamen (supra, p. 9 ; Tr. 828). The Chan brothers arranged for the sale of that heroin. At or about the same time, Lam sold 1 1/2 pounds and 1 pound of heroin, respectively, but separately, to individuals named Chan Yuk Wo and Chung Koh. (Tr. 841-2).

In early April, the Chan brothers and Ding were arrested in possession of 11 pounds of heroin in New York, having made the mistake of dealing with

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* Ding (Sze Yin Chan) testified as a government witness. He had nothing to say about the defendant Leong. (Tr. 1827 et seq.).

undercover agents (Tr. 843, 1827 et seq.). These arrests precipitated the unsuccessful attempt to abort the second Thomsen voyage on the Luna, as described supra, p. 11.

C. The Defendant Victor Leong.

As shown by the government evidence, during the period of the events of this case, Leong was a professional gambler who made the rounds of Chinese gambling houses which are prevalent in the Chinese areas of New York and San Francisco (Tr. 847). The only witness to give inculpatory testimony against Leong was Lam, an admitted perjuror whose motivation for testifying is set forth supra in a footnote at pp. 6-7.

If Lam's testimony is true, then the only sale of narcotics to Leong was in September, 1971 and was from the first successful shipment to New York. There is no evidence in this record that Leong had any knowledge concerning any other sales made by Lam or concerning Lam's source of supply or concering the circumstances of the importation of the heroin. Similarly, there is no evidence in this record as to where Leong allegedly received the 1/2 pound of heroin. The heroin had arrived with Olsen at Kennedy Airport and had been stored at Lam's home in Flushing, both of which were outside the Southern District of New York. (Tr. 738-748).

Lam's entire direct testimony with respect to

the alleged [illegible] to Leong appears at Tr. 759-761, 780-782.

Lam also testified that in October, 1971, upon completing payment for the 1/2 pound, Leong claimed that he was returning to Vancouver to search for additional buyers (Tr. 781-2).

According to Lam, he did not again hear from Leong until March, 1972. Lam testified that Leong said he had located a purchaser in Vancouver, and Lam travelled to Vancouver for the purpose of consummating a sale to that purchaser. With respect to this matter, Lam's testimony is nothing less than a shambles. He claimed that the prospective customer to whom Leong introduced him was Communist Pui - the same person whom he testified had been introduced to him by Wong Chou Shek during the prior December (supra, p. 14 ; Compare Tr. 808-818 and Tr. 837-841). On cross-examination, Lam admitted that he was in error in claiming that Leong had been the person who introduced him to Communist Pui (Tr. 848-851, 873) but again reverted to that claim later in his testimony, although he conceded that his mind was a mass of confusion on the subject (Tr. 875-881), and that he had substituted Victor Leong for Wong Chou Shek in his pre-trial statements to government agents (Tr. 875-881). In any event, he made it categorically clear that no sale of heroin was made to Leong or to anyone brought to him by Leong in Canada (Tr. 837-841).

One final incident remains with respect to the defendant Victor Leong. He is a citizen of Vancouver, British Columbia (Tr. 847). He resided at the Patricia Hotel there. On April 24, 1972, members of the Royal Canadian Mounted Police surreptitiously searched his room, but found nothing of an incriminating nature. (Tr. 1850-2). Moreover, a listening device was implanted, and nothing of an incriminating nature appears to have been overheard (Tr. 1859, 1866). The agents did make copies of photographs of Leong which were found in the room (Tr. 1862-3), and those photographs were probably shown to agents of the United States Drug Enforcement Administration (Tr. 1865), as was any other information derived from this and an additional search of Leong's room and questioning of Leong by the Royal Canadian Mounted Police (Tr. 1882-3). That was conceded by the government at trial (Tr. 1898-9).

CHART "A"

Completed or Attempted Importations of Narcotics

Orient to Brooklyn or Queens, New York

1. Aborted attempt by Unidentified Seaman, June, 1971 aboard Clifford Maersk. Seaman became frightened and narcotics did not get on ship. Quantity: 22 and 1/2 pounds of heroin; 100 pounds of opium.

2. Ernst Olsen flew from Bangkok to New York on or about August 26, 1971. Quantity: 18 pounds of heroin.

3. Conny Gustafson and Steiner Furu sailed from Bangkok on October 3, 1971 and arrived in New York on November 29, 1971 aboard Thomas Maersk. Quantity: 15 pounds of heroin; 100 pounds of opium. Heroin taken off ship in New York. Opium remained on board and returned to Bangkok.

4. John (last name unknown), departed Bangkok for New York aboard Trein Maersk. Seaman became frightened and signed off ship with narcotics in Hong Kong on November 10, 1971. Narcotics flown from Hong Kong back to Bangkok. Quantity: 15 pounds of heroin.

5. John Thomsen departed Bangkok on October 23, 1971 and arrived in New York on December 25, 1971 aboard Luna Maersk. Quantity: 20 pounds of heroin.

6. Eric Hansen departed Bangkok November 8, 1971 and arrived New York January 6, 1972 aboard Lica Maersk. Told not to unload narcotics. Narcotics returned on same ship to Hong Kong. Quantity: 18 pounds of heroin.

7. John Thomsen departed Bangkok March 13, 1972 and arrived New York April, 1972 aboard Luna Maersk. Quantity: 18 pounds of heroin. Entire shipment seized by DEA Agents on December 25, 1972.

Summary: Shipments 2, 3, 5 (53 pounds of heroin) unloaded in New York and distributed (some of which seized during distribution in United States).

Brooklyn or Queens to Vancouver

8. 7 and 1/2 pounds of heroin (from shipment #3) transported from Queens to Vancouver by air on or about December 8, 1971. Five pounds to Wong organization; Two and one-half pounds Wong Chou Chek/Paul Jang.

Orient to Vancouver (Not via United States)

9. Arne Anderson flies 16 pounds of heroin in late December, 1971.

10. Arne Anderson flies 16 pounds of heroin in early January, 1972.

11. Steiner Furu flies 16 pounds of heroin in early March, 1972.

12. Arne Anderson flies 20 pounds of heroin in mid-March, 1972.

13. Steiner Furu flies 20 pounds of heroin in mid-March, 1972.

14. Bernard Dalan flies 20 pounds of heroin on April 7, 1972.

15. Conny Gustafson sails with 20 pounds of heroin on Thomas Maersk on May 19, 1972 and arrives Montreal July 19, 1972.

Summary: 128 pounds of heroin imported into Canada and distributed in Canada.

CHART "B"

DISTRIBUTION OF HEROIN IN THE UNITED STATES

Ma Tsu T'Sung (Ma)(Bangkok)
Tony Ma (Bangkok)
*Wong Shing Kong (Wong)(Bangkok)

[Olsen](18 lbs., Aug. 26, 1971); Gustafson & Furu (15 lbs., Nov. 29, 1971); *Thomsen (20 lbs., Dec. 25, 1971; 18 lbs., Apr. 1972)

*Wong Shing Kong (Wong)/[Olsen](New York)

*Lam Kin Sang (Lam)(New York)

New York

Lee Louie (3 One lb. purchases, Sept., 1971)

[Victor Leong] (1/2 lb. purchase, Sept., 1971)

Eng Fong (1 lb. purchase, Sept., 1971)

Chan Yuk Shui
Chan Yuk Wo
*Jimmy Ding
Chec Cheu g
Cheung K
(Large quantity)
Commencing Dec., 1971
(11 lbs. seized upon arrest, April, 1972)

Lam Shing (1 lb. purchase, Oct., 1971)

Canada

*Lam Kin Sang (Lam)
[Wong Chou Shek]
P. Jang (Communist Pui)
(2 1/2 lbs., Dec., 1971)

Wong's Canadian Organization (See Chart C) (5 lbs., Dec. 1971)

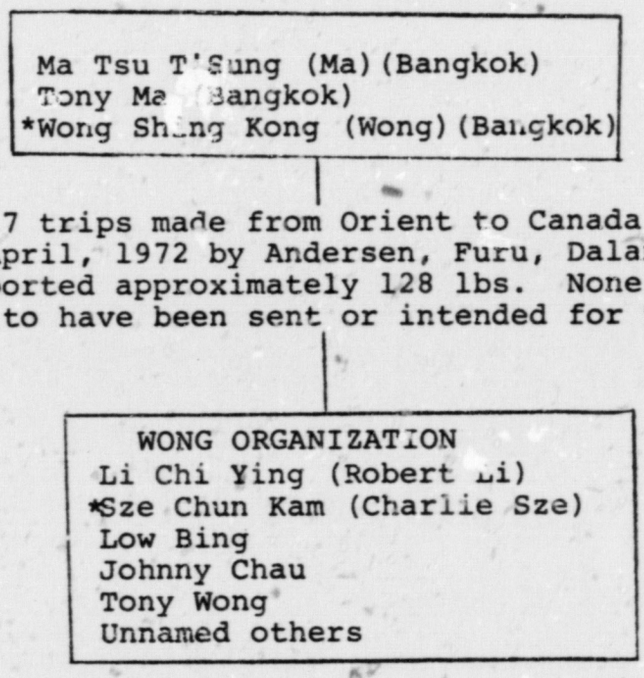
San Francisco

[Wong Chou Shek]
*Pon You Wing
Dung Wong (1/2 lb.)
[Louie Yui Che (Louie Gin)] (3 deliveries totaling 4 1/2 lbs.)
George Kay Lew (Ah Kay) (4 deliveries totaling 11 lbs.)
Undercover Police (1 lb.)

Names in brackets were defendants at the joint trial.
Names preceded by asterisks testified as government witnesses.
Alleged participants in the San Francisco operation are merely listed without effort to indicate chain of distribution.

CHART "C"

THE CANADIAN ORGANIZATION



This chart merely lists participants, and not hierarchy or sequence in Canada.

POINT I

THE GOVERNMENT FAILED TO ESTABLISH VENUE WITHIN THE SOUTHERN DISTRICT OF NEW YORK WITH RESPECT TO COUNT 6, THE ONLY SUBSTANTIVE CHARGE AGAINST THE DEFENDANT LEONG. THE CONVICTION OF LEONG UNDER COUNT 6 SHOULD, THEREFORE, BE REVERSED, AND THE CHARGE SHOULD BE DISMISSED. IF COUNT 6 SHOULD BE REVERSED, THEN LEONG'S CONVICTION UNDER THE CONSPIRACY COUNT SHOULD ALSO BE REVERSED IN VIEW OF THE FACT THAT THE ALLEGATION OF COUNT 6 CONSTITUTES THE ONLY MATTER OF SUBSTANCE IN WHICH LEONG IS ALLEGED TO HAVE PARTICIPATED WITH RESPECT TO THE CONSPIRACY IN THE UNITED STATES.

Count 6 of the indictment charged as follows:

> "On or about the 16th day of September, 1971 in the Southern District of New York, Victor Leong, a/k/a "Foon Choy Leong" the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 250 grams of heroin." (A. 25)

Count 6 was the only substantive crime with which Leong was charged. He was also charged with the conspiracy alleged in Count I. Overt Act No. 20 of the conspiracy count alleged as follows:

> "On or about September 16, 1971 Victor Leong, a/k/a "Foon Choy Leong" registered at the George Washington Hotel, 23rd Street and Lexington Avenue, New York, New York, and thereafter received approximately 250 grams of heroin from Lam Kin Sang at the Tung On Association Gambling House, in New York, New York." (A. 17)

The government's bill of particulars gave no further information with respect to Overt Act. No. 20 (A. 37).

However, the government's bill of particulars did adopt Overt Act No. 20 as being a specification of the facts with respect to Count 6 (A. 43).

At trial, the government's only evidence with respect to this alleged receipt and possession of heroin by Leong was through the testimony of the government witness Lam Kin Sang.

Lam testified that the first shipment of heroin in this case was delivered to him by Olsen at a bar in Brooklyn (Tr. 739-40) and that Lam thereafter brought the heroin to his home in Flushing, Queens (Tr. 741-2, 748). The next day Lam and Olsen picked up the remainder of the shipment at an airport in Queens, and, again, Lam stored the material at his home in Queens (Tr. 748-9). These events occurred on or about August 26, 1971 (supra, p. 12; Tr. 735-7).

Sometime in mid-September, 1971, Lam met Leong in a gambling house in Manhattan and offered to sell him some heroin (Tr. 758-60). As shown by Lam's testimony on direct examination, the actual alleged agreement of Leong to buy the material, and the actual alleged receipt of it by him is unspecified by Lam as to time and place:

"Q. What else was said?

"A. Later on he agreed to buy half a pound from me.

"Q. For how much?

"A. Two thousand dollars.

"Q. Did there come a time when you gave him half a pound?

"A. Yes." (Tr. 760) [Emphasis added]

Although the evidence shows that, while visiting New York, Leong stayed at the George Washington Hotel in Manhattan, there is no evidence whatsoever that he ever received or stored any drugs there (Tr. 761).

During the course of jury deliberations, the jury requested "All government's evidence on Victor Leong; date and place on Count VI." (A. 205). It was then realized that the government had never established that Leong allegedly received and possessed the drug in the Southern District of New York, and defense counsel immediately moved for a judgment of acquittal based upon that failure of proof (A. 207, 208).

When confronted with this defect in the proof, government counsel argued, "I think there is circumstantial evidence on it if you read the full context of the initial meeting [of Lam Kin Sang] with Victor Leong starting at [Tr.] 758.***". To the contrary, our examination of the record, as outlined supra, demonstrates that no such circumstantial proof exists. The record is absolutely silent on the matter, and the inferences are, in fact, to the contrary since Lam kept the drugs at his home outside the Southern District of New York at a location which was convenient to the New York airports from which Leong presumably departed in allegedly bringing the purchase back to his home

in Vancouver (Tr. 760-1). Moreover, all of the inferences from the circumstantial evidence should be drawn in favor of the defendant, since the government had ample opportunity to elicit from its own witness clear and direct evidence of proper venue.

When the existence of the problem became clear, the district court denied a defense motion for a judgment of acquittal as to Count VI and denied a motion to strike Overt Act No. 20 of the conspiracy count (Tr. 212-13). The Court noted to counsel, however, as follows:

> "In the first instance, Mr. Keegan, I am going to leave the matter for the jury's determination. The jury's verdict on the subject may make our discussion academic. It seems to me that if, as, and when they convict on this count you may want to renew your motion. I think that would probably be more appropriate." (Tr. 213)

In a post-trial motion, the defense argued that the conviction ought be set aside both as to the conspiracy and substantive counts due to the government's failure of proof with respect to venue (A. 250-252). The point was re-asserted upon oral argument of the motion (A. 282-284). The trial court denied the motion, finding that there was sufficient circumstantial evidence of venue and that, in any event, the point had been waived since the venue objection had not been specified after the government had rested its case (A. 295-297).

Lack of venue is a jurisdictional defect, United States v. Gross, 276 F. 2d 816, 819 (2d Cir., 1960); United States v. Grossman, 400 F. 2d 951 (4th Cir., 1968).

Failure to prove venue taints the indictment, makes it defective and requires its dismissal. United States v. Bink, 74 F.Supp. 604, 608 (D.C.D.Ore., 1947); United States v. Bozza, 365 F. 2d 206 (2d Cir., 1966).

As stated by Justice Frankfurter in United States v. Johnson, 373 U.S. 273, 275 (1944):

> "Questions of venue in criminal cases...are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even even though not commanded by it."

Writing for the Eighth Circuit, then Circuit Judge Blackmun succinctly stated the law with respect to venue in criminal cases in Holdridge v. United States, 282 F. 2d 302 (8th Cir., 1960):

> "Venue. Article III, Section 2, of the United States Constitution provides that the trial of a crime 'shall be held in the state where***committed.' The Sixth Amendment guarantees an accused 'the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.' Correct venue in criminal cases, therefore, is a matter of constitutional right and questions of venue 'are not merely matters of formal legal procedure' but raise 'deep issues of public policy. United States v. Johnson, 323 U.S. 273,276, United States v. Cores, 356 U.S. 405, 407; Rule 18, F.R.Cr.P., 18 U.S.C. Accordingly, it has been held by this court and others that venue, unless properly waived, is an essential part of the government's case in a criminal prosecution and must be established by adequate proof the

> burden of which is on the government. However, venue need not be proved by direct evidence. It may be established, as any other fact, by the evidence as a whole or by circumstantial evidence. This court has even said that it is not an integral part of a criminal offense and thus need not be proved beyond a reasonable doubt. Dean v. United States, 8th Cir., 246 F. 2d 335, 338; see: Blair v. United States, 8th Cir., 32 F. 2d 130, 132.***" (282 F. 2d 302, 305).

It is established in this circuit that venue is an issue which must be proved to the jury. United States v. Gillette, 189 F. 2d 449, 452 (2d Cir., 1951), cert den., 342 U.S. 827 (1951). See also: United States v. Catalano, 491 F. 2d 268, 276 (2d Cir., 1974), cert den. 419 U.S. 825 (1974); United States v. Provoo, 215 F. 2d 531, 537 (2d Cir., 1954); United States v. Jenkins, 510 F. 2d 495, 498, fn. 4 (2d Cir., 1975); Green v. United States, 309 F. 2d 852 (5th Cir., 1962).

A. The Objection to Venue Was Not Waived.

This Court addressed itself to the problem of waiver of venue in United States v. Price, 447 F. 2d 23 (2d Cir., 1971), cert den., 404 U.S. 912 (1971). The appellant appears to have raised the venue issue in that case for the first time on appeal, and this Court held as follows with respect to the question of waiver:

> "We need not resolve this issue, however, for we find that any valid objection to venue William Hollis Price may have was waived below. Although our precedents establish that the constitutional underpinning and importance of proper venue dictate that waiver of

> objections to venue should not be readily inferred, we have identified two situations where a finding of waiver is proper: (a) when the indictment or statements by the prosecutor clearly reveal this defect but the defendant fails to object; and (b) when after the government has concluded its case, the defendant specifies grounds for acquittal but is silent as to venue. [Citations omitted]." (447 F. 2d at 27).

We thus commence with the holding of Price that "waiver of objections should not be readily inferred". The first situation in which Price justifies a finding of waiver is when the indictment or statements of the prosecutor clearly reflect the defect to be present, and the defendant fails to object. In the present case, as noted supra, p. 22, Overt Act. No. 20 of the conspiracy count clearly alleges that Leong received and possessed the heroin at a gambling house in Manhattan, and the government's bill of particulars incorporates that claim as being in satisfaction of its obligation to provide the defendant with information with respect to the substantive crime charged in Count 6. Thus, the defect was not apparent; to the contrary, the indictment and the government's statements specifically alleged the existence of proper venue.

The second situation described in the Price opinion as justifying a finding of waiver requires a careful reading in order to avoid an exaggerated interpretation of its meaning. It does not state that the defendant must specify the lack of venue objection at the conclusion of the government's case. The holding is merely that if the defendant

specifies grounds for acquittal, waiver may be found if he is silent as to venue.*

Unlike the situation in Price (447 F. 2d at 27), assigned counsel for the defendant Leong did not, at the conclusion of the government's case, attempt to "specify" the grounds for acquittal. The total colloquy between the Court and counsel was as follows:

> "MR. KEEGAN: At this time defendant Victor Leong moves for a judgment of acquittal on the basis the evidence is insufficient to submit the case to the jury, and the mind of no reasonable juror could conclude guilt beyond a reasonable doubt on the case the government has presented."
>
> "THE COURT: Motion is denied." (A. 116-7)

Similarly, at the conclusion of all of the evidence, the colloquy was as follows:

> "MR. KEEGAN: Your Honor, at this time defendant Leong renews his motion for a judgment of acquittal made at the close of the government's case on the same basis.
>
> "THE COURT: The Court denies the motion." (A. 120-121)

It is respectfully submitted, therefore, since counsel did not attempt to specify his grounds, the venue issue was not waived. See also: United States v. Jones,

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*The opinion in Price detailed the failure of the defendant in that case to raise the issue following the verdict and at the time of sentence. (447 F. 2d at 27).

174 F. 2d 746 (2d Cir., 1949); United States v. Brothman, 191 F. 2d 70 (2d Cir., 1951); Gilbert v. United States, 359 F. 2d 285, 288 (9th Cir., 1966).

B. There was Insufficient Circumstantial Evidence to Establish Venue in the Southern District of New York.

As we have argued supra, at pp. 22-25 , the facts herein were clearly insufficient to warrant a finding that Leong possessed heroin within the Southern District of New York. The District Judge charged the jury, before the venue problem surfaced, that venue must be established beyond a reasonable doubt (A. 162). In this connection, we would urge that the reasonable doubt standard is the law of this case. Even if that were not so, however, only rank speculation would find that the circumstantial evidence established venue by a preponderance of the evidence. As was stated in the oft-quoted opinion of Judge Prettyman in Curley v. United States, 160 F. 2d 229 (D.C.Cir., 1947):

> "The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy.***" (160 F. 2d at 232) [Emphasis added]

A similar situation was found to require reversal of a conviction in United States v. Overshon, 494 F. 2d 894 (8th Cir., 1974), where the Court ruled as

follows:

> "The uncertainty of venue derives from the location of Rolla in the Eastern District of Missouri. This city is the seat of government of Phelps County, which is the westernmost county in the Eastern District and is a relatively short distance from the eastern border of the Western District of Missouri. The evidence concerning the sales of the firearms shows that both transactions were at locations "approximately" several miles south of Rolla. The government made no attempt to pinpoint exactly where in Phelps County the substantive offense was committed. This deficiency in the proof was conceded by the Assistant United States Attorney who prosecuted the case in the district court and represented the government on appeal. Because of the lack of any evidence as to venue and considering that the place where the substantive offense occurred was near the borderline between the Eastern and Western Districts of Missouri, we have no alternative but to reverse the conviction against Curtis Overshon on the substantive count." (494 F. 2d at 899)

It is respectfully submitted that the government failed to establish venue with respect to the substantive crime charged in Count 6. For that reason, the conviction under that Count should be reversed and the Count should be dismissed.

C. The Failure to Establish Venue Also Requires Reversal of the Conspiracy Conviction.

The one possession of heroin alleged in Count 6 constitutes the only purchase or possession claimed against Leong with respect to the entire case. Overt Act No. 20 alleged possession by Leong at a gambling house in Manhattan.

Since that was precisely the same possession alleged with respect to Count 6, the government failed in its proof as to Overt Act No. 20. Nevertheless, the Court denied a defense motion to strike Overt Act. No. 20 and to so instruct the jury (supra, p. 25). We respectfully urge that in view of this failure of proof, and particularly in light of the multiple conspiracy arguments raised infra under Point II, the defendant was so prejudiced by the inclusion of Count 6 and the allegation of Overt Act No. 20, that his conviction under the conspiracy count should be reversed as well.

POINT II

THE EVIDENCE AT TRIAL CLEARLY DEMONSTRATED THAT THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT WAS, IN FACT, AN IMPROPER JOINDER OF SEVERAL CONSPIRACIES INCLUDING CONSPIRACIES OF WHICH THE DEFENDANT LEONG WAS NOT SHOWN TO BE A MEMBER. MOREOVER, THE GOVERNMENT IMPROPERLY WAS PERMITTED TO ESTABLISH CONSPIRACIES AS TO WHICH THE UNITED STATES HAD NO JURISDICTION. THE VARIANCE ESTABLISHED BY THE PROOF ENTITLED THE DEFENDANT LEONG TO A DIRECTED VERDICT OF ACQUITTAL; IN THE ALTERNATIVE, HE WAS ENTITLED TO A MISTRIAL AND A SEVERANCE.

In the present case, the government outdid itself by attempting to establish that the defendant's alleged purchase of a half-pound of narcotic drug somewhere in the Metropolitan New York area made him part of a global conspiracy which allegedly trafficked in hundreds

of pounds of various types of narcotic drugs. In view of the extraordinary length and range of evidence adduced at the present trial, all of which presented an overwhelming aura of illicit drug traffic, it must be concluded that the "spill-over" effect was decisive as against the defendant Leong. Had he been tried solely upon those activities in which he was allegedly involved, there was at least a reasonable likelihood that he would have been acquitted. In view of its putrid source, the jury might well have disbelieved the testimony of the only witness against Leong, Lam Kin Sang, concerning the limited nature of his alleged dealings with the defendant. United States v. Jenkins, 496 F. 2d 57, 70 (2d Cir., 1974); Kotteakos v. United States, 328 U.S. 750 (1945); United States v. Weiss, 491 F. 2d 460, 467 (2d Cir., 1974); United States v. Kaufman, 453 F. 2d 306, 311 (2d Cir., 1971); United States v. Gaines, 460 F. 2d 177, 178-80 (2d Cir., 1972); United States v. Sperling, 506 F. 2d 1323, 1340-1 (2d Cir., 1974).

It is respectfully submitted that the government's proof at trial established multiple conspiracies, thus constituting a variance between the indictment and the proof and requiring a dismissal of the charge or, in the alternative, a new trial. In this connection, it is also urged that, for the same reasons, the defendant was entitled to a severance from the other trial defendants and he was entitled to a severance of counts of the

indictment so as to limit the issues at trial to those events with which he could properly be connected.

As shown in our statement of facts, the government adduced substantial evidence with respect to the passage of narcotic drugs from Asia to Canada, and between Asian countries. The drugs in question were not shown to have passed to or through the United States. The existence of such drug traffic did not constitute a crime against the United States, and was not properly a part of the proof with respect to a conspiracy violative of the laws of the United States. The introduction of such evidence could only have had the effect of fragmenting the issues and facts to an extent which confused and overwhelmed the jury.

In Kotteakos v. United States, 328 U.S. 750, 773 (1946), the Court made clear that the joinder of multiple defendants in a mass trial based on a conspiracy charge is a situation "... exceptional to our traditions and call[s] for use of every safeguard to individualize each defendant in his relation to the mass." See also: United States v. Wolfson, 437 F. 2d 862, 870 (2d Cir., 1970); United States v. Branker, 395 F. 2d 881, 887 (2d Cir., 1968).

In United States v. Sperling, 506 F. 2d 1323, 1340-1 (2d Cir., 1974), this Court said:

> "In view of the frequency with which the single conspiracy versus multiple conspiracies claim is being raised on appeals before this Court *** we take this occasion to caution the government with respect to future prosecutions that it may be

> unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendant and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government having prosecuted the offenses here involved in one rather than two conspiracy trials. On the contrary, many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself. We have already alluded to our problems at the appellate level, where we have had to comb through a voluminous record to give adequate consideration to the claims of eleven separate appellants."

Our argument urging reversal is all the more compelled by this Court's recent opinion in United States v. Bertolotti, - F. 2d - (November 10, 1975) slip sheet ops. at 6409 (September Term, 1974). In Bertolotti, this Court stated:

> "When convictions have been obtained on the theory that all defendants were members of a single conspiracy although, in fact, the proof disclosed multiple conspiracies, the error of variance has been committed. [Citations omitted]" (Slip sheet ops. at 6417)

In reversing the conviction in Bertolotti, upon the ground that prejudicial multiple conspiracies were established, this Court further stated:

> "Our examination of the evidence reveals a sufficient basis for the jury to be satisfied beyond a reasonable

> doubt that each of the asserted transactions took place, but no evidence linking them together in a single overall conspiracy. [Citations omitted]. Indeed, the only common factor linking the transactions was the presence of Rossi and Coralluzzo. This type of nexus has never been held to be sufficient. [Citation omitted]. We find our description of the operation in Miley perfectly apt in the instant case. The operations centering around Rossi and Coralluzzo could hardly be attributed to any real organization, even a 'loosely knit' one. [Citation omitted] There was no evidence to show that these two 'were conducting what could seriously be called a regular business on a steady basis.' The scope of the operation was defined only by Rossi's resourcefulness in devising new methods to make money.
>
> "It is clear to us that the government has merely merged several conspiracies for the sake of convenience. [Citation omitted]." (Slip Sheet ops. at 6419)

The government's merger of several conspiracies in the present case improperly and prejudicially subjected Leong to a deluge of evidence with respect to the unrelated criminal conduct of numerous other persons. Assuming, arguendo, that some such evidence might have been appropriate for purposes of background or context, then this was a case in which the background and context consisted of ninety-eight percent (98%) of the trial proof. It has frequently been held that lengthy trials that are the result of cumulative, although relevant and admissible, evidence, may result in such unfairness to a defendant as to be violative of his right to a fair trial. As was stated by Mr. Justice Cardozo in Shepard v. United States, 290 U.S. 96, 105 (1933): "When the risk of confusion is

so great as to upset the balance of advantage, the evidence goes out." See also: United States v. Costello, 221 F. 2d 668 (2d Cir., 1955), aff'd. 350 U.S. 359 (1956); International Shoe Mach. Corp. v. United States Mach. Corp., 315 F. 2d 449, 459 (1st Cir), cert den., 375 U.S. 820 (1963); Wigmore on Evidence (3d Ed.), § 7907. It is respectfully submitted that the government's evidence in the present case not only demonstrated multiple conspiracies but was so unnecessarily cumulative with respect to the conspiracy of which the defendant Leong was, allegedly, a part, that it deprived him of his right to a fair trial. As this Court stated in United States v. Kelly, 349 F. 2d 720 (2d Cir., 1965), the defendant in that case was entitled to a severance from his co-defendant so as to avoid, at the defendant's trial, the introduction of much prejudicial evidence which was irrelevant with respect to the defendant's guilt, and that "no amount of cautionary instructions could have undone the harm to [the defendant]." (349 F. 2d at 758).*

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*The appellant Leong has specifically adopted all relevant arguments contained in the briefs of the co-appellants. In this respect, we particularly note to the Court Point II of the brief filed by the co-appellant, Wong Chou Shek, wherein it is made clear that the trial strategy of the co-defendant Olsen also necessitated the granting of a mistrial and a severance. See: A. 62, 71-2, 77-98, 101.

Similarly, if the government had not been intent upon introducing cumulative evidence unrelated to the conduct or knowledge of the defendant Leong, there would have been no testimony at Leong's trial concerning fear that the co-defendant Wong Chou Shek might have a government witness killed. See: A. 56-61, 103, 109-110. The conduct alleged with respect to Wong Chou Shek and his associates was clearly unrelated to anything of which Leong was allegedly engaged.

The defense motions with respect to double jeopardy, mistrial, severance and to strike the objectionable testimony, were consistently preserved throughout the trial. Also, when the issue was first raised with respect to the separate conspiracy presented by the Canadian transactions, the prosecutor alleged that he would prove a conspiracy to ship the Canadian heroin to the United States (A. 66). No such proof was elicited at the instant trial. See also: Objections at A. 74, 75, 76, 80, 88, 115.

The Court did charge the jury that if it should find that Count 1 in fact charged separate and independent conspiracies rather than a single overall conspiracy as charged in the indictment, then the defendant must be found not guilty. Although no exception was taken to the charge, we respectfully submit that it was an "all or nothing" charge similar to the one found impermissible in United States v. Kelly, 349 F. 2d 720, 757-758 (2d Cir., 1965), cert den., 384 U.S. 947 (1966), in that it forced the jury to give each of the defendants on trial the same standing with respect to the issue. (Contra, United States v. Cohen, 518 F. 2d 727, 735). Equally egregious, although not excepted to on this ground, was the only concrete example given to the jury with respect to how a defendant would become a member of the conspiracy:

> "To use Louie Yiu Che as an example again, the government contends that Louie Yiu Che received his heroin from other

> defendants and alleged conspirators. The government concedes that he was not acquainted with many of the other conspirators such as Ma Tsu T'Sung, the supplier in Thailand. Should you find that he entered into an unlawful agreement to obtain heroin from other defendants and alleged conspirators, then he is a member of the overall conspiracy." (A. 144-5)

We respectfully submit that the aforementioned charge was violative of the so-called "single act doctrine" enunciated in United States v. Sperling, supra, 506 F. 2d at 1342 and in United States v. Torres, 503 F. 2d 1120, 1123 (2d Cir., 1974). We respectfully urge that this Court take notice of these errors in the charge as plain error. Alternatively, the errors in question certainly enhance our contention that the defendant was deprived of a fair trial due to proof of multiple conspiracies and the government's excessively cumulative evidence.

For all of the above reasons, it is respectfully submitted that the judgment of conviction of the defendant Leong ought be reversed, and the conspiracy count of the indictment ought be ordered dismissed upon the ground that the proof, in fact, demonstrated multiple conspiracies of which the defendant was not a member. In the alternative, the defendant should be granted a new trial in view of the prejudice suffered by him as a result of the denial of a mistrial and severance.

POINT III

WHEN, IN SUMMATION, THE PROSECUTOR CALLED UPON THE DEFENSE TO REPLY TO FACTUAL QUESTIONS PUT TO THE DEFENSE BY THE PROSECUTOR, THE DEFENDANT WAS DEPRIVED OF DUE PROCESS OF LAW AND OF HIS FIFTH AMENDMENT RIGHT AGAINST COMPULSORY SELF-INCRIMINATION.

In accordance with the current practice, the prosecutor was the first to deliver his summation to the jury. He utilized that summation as a vehicle to compel comment by the defense to the jury with respect to various facts in issue:

> "When Mr. Keegan [Leong's defense attorney] argues that to you ask him in your own mind this question: If Lam is going to lie about Victor Leong, why didn't Lam implicate Victor Leong in the San Francisco transaction?" (A. 123)
>
> * * *
>
> "If you are going to lie about someone, why not try to make one sound as bad as possible? But Lam didn't do that. Ask Mr. Keegan why." (A. 123)
>
> * * *
>
> "If and when any defense counsel argues that to you when they sum up, ask them in your mind why this inconsistency is present in the testimony." (A. 124)

Then, in rebuttal, the prosecutor taxed defense counsel for not answering the prosecutor's questions:

> "I also suggest to you that Mr. Keegan never answered the question I posed to him

> and to you when I first talked to you this morning, and that question was, if Lam Kin Sang is getting on the stand and lying about everything, if he is testifying and trying to implicate Victor Leong in an attempt to get himself out of jail, why did Lam Kin Sang say he only sold a half pound of heroin to Victor Leong?" (A. 125-6)

Rule 29.1 F.R.Cr.P. permits, but does not require, the defense to make any closing argument whatsoever. It is respectfully submitted that a requirement that the defense make a closing argument to the jury would be violative of the Fifth Amendment prohibition against compulsory self-incrimination. When the prosecutor, in summation, put questions to defense counsel, he was doing no less than attempting to question the defendant through the defendant's representative. Then, in rebuttal, the prosecutor faulted the defense for not responding to its questions. That combination of tactics constituted a violation of the defendant's privilege against self-incrimination and a comment upon the failure of the defense to express itself. For that reason, the defendant's rights to due process and against self-incrimination were violated, and he should be granted a new trial.

POINT IV

THE DEFENDANT WAS ENTITLED TO A HEARING WITH RESPECT TO WHETHER ANY OF THE TRIAL EVIDENCE WAS DERIVED FROM SEARCH AND ELECTRONIC SURVEILLANCE WHICH THE TRIAL COURT FOUND ILLEGAL.

At the instant trial, the Court conducted a suppression hearing with respect to evidence seized by the Royal Canadian Mounted Police from a hotel room of the defendant Leong in Canada (Tr. 1848-1907). That hearing disclosed both the fact of a physical search of the defendant's hotel room and the implantation of an electronic listening device which, respectively, resulted in the seizure of physical and conversational evidence, including photographs of the defendant himself. At the conclusion of the hearing, the district court found:

> "Although the search did not take place at the specific direction of the American authorities, the search directly resulted from a joint venture in which agents of the United States Government had a substantial participation.
>
> "Accordingly, the defendant's motion to suppress is granted. It is so ordered." (A. 112-114)

None of the actually seized physical or conversational evidence was introduced at the instant trial. However, upon the present state of the record, it is not possible to ascertain whether such actually seized evidence resulted in the production or discovery of other physical or testimonial evidence.

Prior to trial, the defense formally moved in writing for an order to suppress any evidence discovered as a result of said illegal search, or as a result of 'leads' developed from said illegal search... (A. 46) [Emphasis added] At the Court's request, the hearing on the motion was delayed until the midst of trial (A. 51-6). Then, when the Court actually held the hearing and suppressed the evidence, no determination was made as to what if any of the trial proof already elicited may have been derived from the illegally obtained evidence. Lam Kin Sang, the only government witness who testified against the defendant, had already given his testimony. Nothing could be accomplished by conducting a taint hearing at that point. Thus, in a post-trial motion, defense counsel formally moved for such a hearing (A. 244-247a). Following argument of the motion (A. 275-279, 28[illegible] 291-293), the Court denied the motion (A. 293-294).

It may well be that the photographs,an address book and other records that have been found to have been illegally seized from the defendant's possession were utilized by government agents directly or indirectly for the purpose of preparing Lam Kin Sang to testify against the defendant. The principles enunciated in Wong Sun v. United States, 371 U.S. 471 (1963) are applicable. Quoting from Maguire, Evidence of Guilt, 221 (1959), the Supreme Court stated that:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply

> because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'." (371 U.S. at 487-88).

It is respectfully submitted that, based upon the above quoted authority, this case should be remanded to the district court for a hearing as to the issue of taint.

POINT V

THE APPELLANT LEONG ADOPTS ALL APPLICABLE POINTS OF THE CO-APPELLANTS.

Conclusion

For all of the above reasons, the judgment of conviction ought be reversed, and the indictment should be dismissed; in the alternative, the case should be remanded for a new trial and for a "taint" hearing.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Appellant
Victor Leong

March 19, 1976